

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 February 2014

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested personal data of another person.
2. The Commissioner's decision is that the Ministry of Justice erred by disclosing it held the requested information when it should have neither confirmed nor denied it held the information.
3. The Commissioner requires no steps to be taken by the Ministry of Justice.

Request and response

4. On 4 March 2013 the complainant requested information, from the Ministry of Justice (MOJ), as follows:

"Please provide me with details of the new home address for Mr K (name redacted – "data subject"), and details of any conditions as to address etc within his licence. It would also be useful to know whether there are any 'good character' conditions attached to his licence (as failure to comply with a County Court Judgement Order could have an impact on those licence conditions)."
5. On 11 April 2013 the MOJ replied by refusing to provide the information on the grounds that it was a third party's personal data and relied on section 40(2) of the Act to do so.

6. The complainant subsequently sought to challenge this response with the MOJ but it still refused to provide the information requested.

Scope of the case

7. The complainant contacted the Commissioner, on 10 July 2013, to complain about the way his request for information had been handled.
8. By way of a letter dated 18 November 2013, the MOJ confirmed to the Commissioner that it relied on section 40(2) not to communicate the requested information to the complainant.
9. By way of a letter received on 27 November 2013 the complainant, amongst other things, made a request of the Commissioner to consider the application of section 35 of the Data Protection Act 1998 ("DPA") in his decision.

Reasons for decision

10. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - the duty to inform the applicant whether or not requested information is held and, if so,
 - the duty to communicate that information to the applicant.
11. A disclosure under the FOIA constitutes a disclosure into the "public domain"; a public authority cannot take into account the identity or motives of the requestor when disclosing information under this access regime.
12. Section 40(5) provides an exemption from the duty to confirm or deny where to do so would disclose personal data and the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process; first, confirmation or denial in response to the request must involve the disclosure of personal data. Secondly, this disclosure must be in breach of at least one of the data protection principles.
13. Personal data is defined in the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

14. The request is specifically for information about a named individual and as a result it is inescapable that confirmation or denial would disclose whether the MOJ holds information that both identifies and relates to the individual named in the request. The view of the Commissioner is that it is clear that confirmation or denial in response to the request would disclose personal data relating to the individual named in the request.
15. The first data protection principle says that personal data should be processed fairly and lawfully, subject to further conditions for processing set out in the DPA.
16. In considering whether disclosure of personal data would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner considers the following, most relevant, factors:
 - The data subject's reasonable expectations of what would happen to their personal data.
 - The consequences of disclosure.
 - The balance between the rights and freedoms of the data subject and the legitimate interests of the public.
17. There is nothing to suggest that the data subject has consented for the MOJ to confirm or deny it holds the requested information. However, non-expression of consent is not solely determinative as to whether a data subject's personal data will be disclosed. It is one, albeit very weighty, factor that has to be weighed against factors which focus on the public interest in releasing the information.
18. A consequence of disclosure would be that the public would know that the data subject had or had not been involved in the criminal process and whether he is "known" to the MOJ because this is the context in which any relevant information would be held. Furthermore, the data subject would not reasonably expect this to be disclosed in response to a request made under the FOIA.

19. The Commissioner does not doubt there is some public interest in knowing whether the data subject has been the subject of criminal proceedings. However they are not as such to outweigh the data subject's right to privacy. Accordingly it is the Commissioner's decision that the complainant is not entitled to know, in response to his FOIA request, whether the requested information is held. Consequently, lawful response would have been to rely on the absolute exemption provided by section 40(5)(b)(i) to neither confirm nor deny it held the requested information.

Other matters

20. In his letter (received on 27 November 2013), the complainant made a request for the Commissioner to consider the application of section 35 of the DPA in his decision.
21. Section 35 (2) of the DPA provides that:
- "Personal data are exempt from the non-disclosure provisions where the disclosure is necessary –
- a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or
 - b) for the purpose of obtaining legal advice, or otherwise necessary for the purposes of establishing, exercising or defending legal rights."

22. In response to the above request, the Commissioner wishes to state that except where the FOIA specifically permits for requests made under its provisions, he is unable to determine any issue under the DPA. This is because the FOIA and the DPA are different information access regimes, each subject to different disclosure considerations or tests. Under the FOIA, disclosure is deemed to be made to the public 'at large'. However, disclosure under the DPA is deemed to be made directly to the applicant.

23. The primary issue for consideration under the FOIA is whether or not the public authority is under an obligation to disclose the information requested directly to the complainant. Therefore any request by the complainant for the Commissioner's determination under the DPA should be brought under the DPA, which is the appropriate regime. The Commissioner's website (www.ico.gov.uk) contains further advice and information on this issue.

Right of appeal

24. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Alexander Ganotis
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